UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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ROCHELLE M. McCAW, formerly known as ROCHELLE M. NELSON, Plaintiff, vs. JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POST OFFICE SERVICE, et al., Defendants.	Case No.: 2:04-CV-878-RLH-RJJ **O R D E R** (Motion for Summary Judgment and Motion to Dismiss–#64)

Before the Court is John E. Potter's (Federal Defendant) **Motion for Summary Judgment and Motion to Dismiss** (#64), filed May 1, 2006. The Court has also considered Plaintiff's Opposition (#68), filed June 14, 2006, and Federal Defendant's Reply (#70), filed June 27, 2006.

BACKGROUND

Plaintiff filed this Civil Rights Complaint on June 24, 2004, alleging, inter alia, employment discrimination by the Federal Defendant. Specifically, Plaintiff alleges (1) retaliation by the Postal Service and the Postal Inspection Service for lodging a sexual harassment complaint

against Neil Call, (2) being subjected to a hostile and offensive workplace, and (3) constructive discharge.

Plaintiff was a twenty-three year employee of the United States Postal Service, where she served as a postage due clerk at the James Brown Mail Facility. Neil Call was a Postal Inspector with the Postal Inspection Service in Las Vegas and had been employed since 1983. In August 1998, Plaintiff and Call met and began a consensual sexual relationship, which included engaging in sexual activities at Plaintiff's work site. In July 1999, Plaintiff informed Call that she would not have sex with him anymore until he divorced his wife. Nonetheless, Call continued to visit Plaintiff intermittently at the James Brown Mail Facility between August 1999 and January 2000. Although these unwelcome visits did not result in sex, Call would fondle Plaintiff's private parts and demand that Plaintiff satisfy Call's sexual urges.

Plaintiff alleges that Call had previously told her stories of how Postal Inspectors covered up crimes they did not want to investigate. Plaintiff claims that she was afraid of Call, as a postal inspector, because either Call or his immediate colleagues would have been made aware of any investigation of sexual harassment lodged by Plaintiff. As a result, Plaintiff did not report any of these unwanted visits to her supervisor at the James Brown Mail Facility for fear of having Call or one of his friends investigate and cover up her allegations.

Prior to the harassment, Plaintiff claims she was a happy, jovial person who would engage in light-hearted banter with her co-workers, often telling jokes. During the harassment, however, her demeanor changed completely and she became withdrawn, depressed, and cried a lot. Nonetheless, her supervisors, who were required to visit her desk area at least twice during a shift, never inquired about her well-being.

After a prolonged period of not speaking to one another, Plaintiff sent Call a birthday card on January 20, 2000. Call used this opportunity to inform Plaintiff that their relationship was over and that he had begun dating another woman. Thereafter, in late January 2000, Plaintiff's deteriorating medical condition compelled her to report the sexual harassment to

the Union President, Billy Harrell, and the then plant manager of the James Brown Facility, Clifford Rucker. Rico Caggiano, an investigator with the Postal Inspection Service in Washington, D.C., was subsequently assigned to the case. According to Plaintiff, Caggiano is a friend of Call's and had personally trained Call. Notwithstanding the apparent conflict of interest, Caggiano remained on the case and interviewed Plaintiff on February 6, 2000, and Call on February 9, 2000, after which Call was placed on administrative leave. Caggiano proceeded with a criminal investigation of Plaintiff's sexual harassment complaint. The investigation concluded in May 2000.

In June 2000 Caggiano called Plaintiff and informed her that due to her complaint and supporting documents the entire Postal Inspectors' office in Las Vegas was under investigation for umpiring for a fee at local sports events while also being paid by the Postal Agency. Plaintiff alleges that this caused her great emotional distress, which exacerbated her mental state. On June 22, 2000, a Stand-up Lecture was called for all available postal employees at the General Mail Facility. Two Postal Inspectors put on the lecture. At the end of the lecture one of the Postal Inspectors stated, "50% of people divorce, 50% of relationships fail, and when you date someone at work, don't go after them after the relationship fails." After the lecture, Plaintiff was allegedly approached by a number of people who expressed the view that the lecture had been about her. According to Plaintiff, the lecture exposed her to the scorn and ridicule of her co-workers and supervisors and was a deliberate effort to embarrass, intimidate, and harass Plaintiff.

Plaintiff alleges that the manner in which the investigation was conducted caused Plaintiff to be excluded from on the job conversations and friendships that she had developed over the years. Although Plaintiff's sexual harassment and hostile workplace claims were based on Call's unwelcome attempts to compel sex at her workplace from August 1999 to January 29, 2000, the Postal Inspectors investigating the claims would graphically detail the consensual sexual activities of Plaintiff with Call that occurred in the workplace prior to August 1999.

Plaintiff began individual therapy with a local psychiatrist on February 18, 2000, and continued the sessions until August 17, 2000. On July 18, 2000, Plaintiff completed an Application for Immediate Retirement. On July 26, 2000, Plaintiff's request for 240 hours of advanced sick leave was approved to begin on July 31, 2000, which consequently was Plaintiff's last day of work at the U.S. Postal Service. Upon expiration of Plaintiff's advanced sick leave, Plaintiff did not return to work. On November 14, 2000, Plaintiff's application for disability retirement was approved. On September 27, 2000, while on advanced sick leave status, Plaintiff made her initial contact with EEO by filing a request for Precomplaint Counseling. In December 2001, Call was terminated from the Postal Inspection Service.

DISCUSSION

I. Summary Judgment Standard

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine"only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute is "material" only if it could affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the court must view all facts and draw all inferences in the light most favorable to the non-moving party. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983).

Once the moving party satisfies the requirements of Rule 56, the burden shifts to the party resisting the motion to "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256; *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The non-moving party "may not rely on denials in the pleadings but must produce specific evidence,

through affidavits or admissible discovery material, to show that the dispute exists," *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1409 (9th Cir.1991), and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*, 475 U.S. 574, 586 (1986).

II. Title VII

Title VII prohibits employment discrimination based on an individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). To prevail on such a claim, Plaintiff must establish a prima facie case of discrimination by offering evidence that "give[s] rise to an inference of unlawful discrimination." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). This evidentiary showing may be satisfied by presenting either direct evidence of discriminatory intent, *Cordova v. State Farm Ins. Cos.*, 124 F.3d 1145, 1148 (9th Cir. 1997), or by meeting the elements set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). "At the summary judgment stage, the 'requisite degree of proof necessary to establish a prima facie case . . . is minimal and does not even need to rise to the level of a preponderance of the evidence.'" *Lyons v. England*, 307 F.3d 1092, 1112 (9th Cir. 2002) (quoting *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994)).

Once plaintiff has satisfied this evidentiary requirement, there is a rebuttable "presumption that the employer unlawfully discriminated against the employee." *Burdine*, 450 U.S. at 254. The burden of production then "shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its allegedly discriminatory conduct." *Vasquez v. County of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003). To satisfy this required articulation, the defendant must clearly set forth, through the introduction of admissible evidence, legitimate reasons for its conduct. *Burdine*, 450 U.S. at 255.

"If the employer sustains this burden, the plaintiff must then demonstrate that the proffered nondiscriminatory reason is merely a pretext for discrimination." *Lyons*, 307 F.3d at 1112. Plaintiff can demonstrate pretext either "(1) indirectly, by showing that the employer's

proffered explanation is 'unworthy of credence' because it is internally inconsistent or otherwise not believable, or (2) directly, by showing that unlawful discrimination more likely motivated the employer." *Chuang v. Univ. of California Davis, Bd. of Trs.*, 225 F.3d 1115, 1127 (9th Cir. 2000) (quoting *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220-21 (9th Cir. 1998)). This showing of pretext does not necessarily impose a new burden of production. "[A] disparate treatment plaintiff can survive summary judgment without producing any evidence of discrimination beyond that constituting his prima facie case, if that evidence raises a genuine issue of material fact regarding the truth of the employer's proffered reasons." *Chuang*, 225 F.3d at 1127. *See also Lyons*, 307 F.3d at 1112 (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000)) ("the factfinder may infer 'the ultimate fact of intentional discrimination' without additional proof once the plaintiff has made out her prima facie case if the factfinder believes that the employer's proffered nondiscriminatory reasons lack credibility").

A. Retaliation

In order to establish a prima facie case of retaliation under Title VII, Plaintiff must demonstrate that (1) she engaged in an activity protected under Title VII; (2) her employer subjected her to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse employment action. *See Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir.2000). The Court will now determine whether the elements for a claim of retaliation under Title VII's opposition clause are met.

1. Protected Activity

Plaintiff alleges that her verbal complaint about sexual harassment to Cliff Rucker in late January 2000 and the follow-up complaint to the Postal Investigators from Washington D.C. on February 6, 2006, are protected by Title VII of the Civil Rights Act under the opposition clause. The opposition clause of 42 U.S.C. § 2000e-3(a) states in relevant part, "It shall be an unlawful employment practice for an employer to discriminate against any of his employees ···

because [the employee] has opposed any practice made an unlawful employment practice by [Title VII]····" 42 U.S.C. § 2000e-3(a) (2004).

The Federal Defendant counters that Plaintiff's February 2000 complaint to Mr. Rucker and the Postal Inspectors did not qualify as a protected activity subject to Title VII protections because Plaintiff's purpose in filing her February 2000 complaint was to lodge a complaint against Mr. Call and her perceived sexual harassment by Mr. Call. According to the Federal Defendant there is no evidence, nor has Plaintiff pointed to any, that Plaintiff either alleged (1) an "unlawful employment practice by the U.S. Postal Service prior to February 6, 2000, or (2) any belief by Plaintiff that the U.S. Postal Service prior to February 6, 2000, engaged in unlawful discrimination against the Plaintiff.

The Court notes that the Federal Defendant fails to present any authority for its assertion that Plaintiff's complaint against Mr. Call, an employee of the United States Postal Service, for sexual harassment does not constitute "opposing" a Postal Service practice. The Ninth Circuit has held that "employers may be liable for failing to prevent or remedy sexual harassment among co-workers of which management-level employees knew or in the exercise of reasonable care should have known." *Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir.1991). It is unnecessary that the employment practice actually be unlawful; opposition thereto is protected when it is "based on a ' reasonable belief ' that the employer has engaged in an unlawful employment practice." *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir.1994) (emphasis in original, citation omitted). Here, it was reasonable for Plaintiff to believe that she was opposing an unlawful employment practice by complaining to her supervisors about a fellow employee's sexual harassment which she believed was known or should have been known by management-level employees. Accordingly, the first element is met.

2. Adverse Employment Action

An "adverse employment action" is "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in a

protected activity." *Ray v. Henderson*, 217 F.3d 1234, 1244 (9th Cir.2000). Although this definition includes actions "materially affect[ing] compensation, terms, conditions, or privileges" of employment, 42 U.S.C. § 2000e-2(a)(1), it "is not limited to discriminatory actions that affect the terms and conditions of employment." *Burlington Northern and Santa Fe Ry. Co. v. White,* 126 S.Ct. 2405, 2412-2413 (2006).

Plaintiff alleges that she suffered the following adverse employment actions. First, Cliff Rucker, plant manager, authorized 12 psychological counseling sessions for Plaintiff. Plaintiff began counseling on February 18, 2000, but after four visits the sessions were terminated by the Federal Defendant on March 23, 2000, and were not reinstated until June 9, 2000. Second, Plaintiff alleges she was constructively discharged when she was compelled to take leave without pay (LWOP) and apply for and receive medical disability retirement as a result of her psychological condition which was brought on by both the hostile work environment and the retaliation she suffered. Third, the inspection service investigation was allegedly carried out in a manner designed to ridicule Plaintiff and hold her in scorn. Fourth, the Federal Defendant attempted to terminate Plaintiff. Fifth, Plaintiff was required to attend a "stand-up" lecture designed to attack her. And lastly, Plaintiff was shunned by her co-workers and supervisory personnel.

a. Termination of Counseling Sessions. The Federal Defendant does not contest that the termination of Plaintiff's counseling sessions could constitute an adverse employment action.

b. Constructive Discharge. As for Plaintiff's claim that she was constructively discharged, the Federal Defendant claims that a constructive discharge claim cannot serve as the basis for an adverse employment action. The Court disagrees. The Ninth Circuit has stated in dicta that "[i]If shown, constructive discharge is an adverse employment action." *Jordan v. Clark*, 847 F.2d 1368, 1377, n. 10 (9th Cir.1988) cert. denied, 488 U.S. 1006. The Court finds that being forced to take leave without pay as a result of intolerable work conditions created by the

defendant is sufficiently analogous to being forced to quit. In both instances the plaintiff is foregoing the benefits of working, namely income. *See Llewellyn v. Celanese Corp.*, 693 F. Supp. 369, 381 (W.D.N.C. 1988) (finding that taking medical leave without pay as a result of an intolerable work situation is a constructive discharge in the context of back pay liability). Similarly, the Court also finds merit to Plaintiff's claim that applying and receiving medical disability retirement based on a psychological condition which was allegedly caused by the intolerable work conditions constituted a constructive discharge. Accordingly, because a reasonable person in Plaintiff's position may have felt forced to take LWOP and/or medical disability retirement, as explained in more detail below in the section entitled Constructive Discharge, Plaintiff has sufficiently alleged an adverse employment action.

c. Inspection Service Investigation. With respect to Plaintiff's claim that the inspection service investigation was retaliatory, the Federal Defendant argues that this cannot be an adverse employment action because it is not related to Plaintiff's conditions or terms of employment. However, the Supreme Court recently held that an adverse employment action "is not limited to discriminatory actions that affect the terms and conditions of employment." *Burlington,*126 S.Ct. 2405, 2412-2413. Although the Court agrees that Plaintiff's complaint to the Postal Inspectors did not limit the scope of her investigation to non-consensual acts occurring after August 1999, the Court nonetheless finds that a genuine issue of material fact exists as to whether (1) the investigation was properly carried out, i.e., whether the postal inspectors differentiated between the consensual and non-consensual encounters between Plaintiff and Call and (2) the weight given to Call's denial of non-consensual encounters was appropriate given the Postal Inspection Service's determination that Call's integrity and honesty had been called into question.

Caggiano, the investigator assigned to the case, states in his deposition that he proceeded with a criminal investigation of the sexual harassment claims and concluded his investigation in May 2000, after which he filed a report. Notwithstanding, Plaintiff states in her affidavit that she was never advised verbally or in writing about the results of the investigation or

if any corrective actions had been taken. Further, the Notice of Proposed Removal, dated April 25, 2001, sent to Call informing him of the charges against him, do not list or mention Plaintiff's sexual harassment claims and, instead, includes only the consensual sexual encounters under the heading "Conduct Unbecoming A Postal Inspector." Based on the record before it, the Court finds that a jury could reasonably infer that the sexual harassment charge was not pursued in an attempt to retaliate against Plaintiff for bringing the claim. If so, it is reasonably likely that an individual would not file a sexual harassment complaint if she felt that her complaint would not be thoroughly investigated or that she would not be believed. Accordingly, the Court will not dismiss this claim.

d. Attempted Termination. As for Plaintiff's claim that the Federal Defendant attempted to terminate Plaintiff, the Court finds no merit to this argument. The letter to which Plaintiff refers to as a "Termination Letter" is in fact titled "Notice to Return to Duty" and according to Ms. Ju-Chen Suen, Manager of Distribution Operations, is akin to a "where-are-you" letter requesting information on an employee's continued absence. The letter requests Plaintiff to call regarding her continued absence and to provide documentation for her extended absence within five days of receiving the notice. Ms. Suen testified that the Postal Service does not fire people based on a "where-are-you" letter, nor is it a prerequisite to initiating termination proceedings. In addition, Plaintiff admits that she received the "where-are-you" letter after her disability retirement had been approved. Under the circumstances, the Court cannot find it reasonably likely that a charging party would be deterred from filing a sexual harassment complaint for fear of losing her job as a result of receiving a "where-are-you" letter. According, this claim will be dismissed.

e. Stand-Up Session. With respect to Plaintiff's claim that her required attendance at the "stand-up" was designed to embarrass, humiliate, and attack Plaintiff, the Court finds that Plaintiff has not sufficiently alleged an adverse employment action. A "stand-up" is a workplace training session which is conducted by managers and Postal Inspectors on a variety of

subjects. Paul Stevens was the Postal Inspector assigned to deliver the "stand-up" on June 20, 2000, on assaults and threats in the workplace. During the session, Stevens made the statement that "50% of all relationships fail, and when you date someone at work, don't go after them after the relationship fails." Plaintiff testified she believed the comment was directed at her, and Plaintiff's co-worker, Mary Handley, also testified that she believed the comment was directed towards Plaintiff. Although the Court understands the humiliation and embarrassment Plaintiff may have felt at having the comment seemingly directed at her, neither a "bruised ego," *Flaherty v. Gas Research Inst*., 31 F.3d 451, 457 (7th Cir.1994), nor public humiliation rises to the level of an adverse employment action. *Spring v. Sheboygan Area Sch. Dist.*, 865 F.2d 883, 886 (7th Cir.1989). To be actionable, the embarrassing condition must be severe or pervasive and not the result of reasonable and legitimate employment concerns. *Stockett v. Muncie Indiana Transit System*, 221 F.3d 997, 1002 (7th Cir. 2000). Here, the comment made during the "stand-up" session was neither severe or pervasive; moreover, it was the result of a legitimate employment concern of providing information to employees on assaults and threats in the workplace. Accordingly, the claim will be dismissed.

f. Shunned by Co-Workers. Likewise, the Court will also dismiss Plaintiff's claim that she was shunned by her co-workers and supervisors. Although Plaintiff concedes that co-workers are free to determine with whom they associate, *Brooks v. City of San Mateo*, 229 F.3d 917, 929 (9th Cir.2000), Plaintiff argues that management institutionalized their shunning, thus making it the unwritten policy of the Federal Defendant. Plaintiff appears to assert that because her supervisors did not approach her to ask her what was wrong, she was shunned by management. This, without more, is insufficient to support this claim.

3. Causal Link

The causal link between a protected activity and the alleged retaliatory action "can be inferred from timing alone" when there is a close proximity between the two. *Villiarimo v. Aloha Island Air, Inc*., 281 F.3d 1054, 1065 (9th Cir.2002). The Ninth Circuit has held that events

occurring within similar intervals of time are sufficiently proximate to support an inference of causation. *See Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir.1987) (holding that sufficient evidence of causation existed where adverse employment action occurred less than three months after the protected activity); *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 731-32 (9th Cir.1986) (concluding that there was adequate evidence of a causal link where the retaliatory action occurred less than two months after the protected activity).

The Federal Defendant argues that there is no causal link between Plaintiff's lodging of her complaint with Mr. Rucker on February 3, 2000, and Mr. Schweitzer's alleged denial of medical benefits in April-May 2000. Specifically, the Federal Defendant alleges that Mr. Schweitzer had no knowledge that Plaintiff had engaged in a protected activity because he "was not privy to any conversations or meetings between Mr. Rucker and [Plaintiff]." The Court notes, however, that lack of knowledge of what Mr. Rucker and Plaintiff discussed is separate and distinct from lack of knowledge that Plaintiff had filed a complaint against Call alleging sexual harassment. As a result, the Court cannot find as a matter of law that Mr. Schweitzer had no knowledge that Plaintiff had engaged in protected activity.

With respect to the constructive discharge and service inspection investigation claims, the Federal Defendant does not appear to contest the temporal proximity between these adverse employment actions and the protected activity. Accordingly, Plaintiff has met all the elements to establish a prima facie case of retaliation under Title VII for the following claims: (1) termination of counseling sessions, (2) constructive discharge, and (3) service inspection investigation.

4. The Federal Defendant's Legitimate, Non-discriminatory Reason

The Federal Defendant does not appear to provide a legitimate, non-discriminatory reason for Plaintiff's constructive discharge claim or her service inspection investigation claim. However, with respect to the 2 ½ month interruption in visits in Plaintiff's counseling sessions, the Federal Defendant claims there was no discriminatory motive behind the action. Instead, it

claims the interruption was the unintentional result of a failure to communicate between Mr. Rucker, the former plant manager of the Las Vegas facility who subsequently transferred to Oklahoma, and Dick Schweitzer, the Las Vegas Employee Assistance Program Coordinator. According to Mr. Rucker's deposition, he approved to pay for 12 counseling sessions. After Plaintiff called him to complain about the termination of her counseling sessions, Mr. Rucker called Mr. Schweitzer and told him "to go talk to the new plant manager and get him to pay for the 12," after which the problem was resolved.

5. Pretext for Discrimination

Because the Federal Defendant has proffered a nondiscriminatory reason for its actions with respect to the termination of the counseling sessions, the burden shifts back to Plaintiff to show that the articulated reason is a pretext for discrimination. The Court finds that Plaintiff has presented sufficient evidence from which a jury could infer that the reason was merely pretextual. According to Mr. Rucker's deposition, he informed Mr. Schweitzer prior to leaving for Oklahoma that the facility would pay for the 12 visits, thus undermining the Federal Defendant's claim that there was a failure to communicate between the two. Accordingly, because the Court finds a genuine issue of material fact exists regarding whether the interruption in counseling sessions was the result of a discriminatory motive or a breakdown in communications, the Court will not grant summary judgment on this claim. Therefore, the following claims for retaliation survive: (1) termination of counseling sessions, (2) constructive discharge, and (3) service inspection investigation.

B. Hostile Work Environment

Plaintiff claims the Federal Defendant subjected her to a hostile work environment in violation of Title VII. Specifically, Plaintiff asserts that during the period from August 1999 to January 29, 2000, Call made repeated unwanted sexual advances towards her at her workplace. Further, Plaintiff alleges that the Postal Service is vicariously liable for the actions of Call.

To prevail on this claim, Plaintiff must establish that (1) she was subjected to verbal or physical conduct because of her gender or religion; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment. *Gregory v. Widnall*, 153 F.3d 1071, 1074 (9th Cir. 1998). A workplace permeated with "discriminatory intimidation, ridicule, and insult ... is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc*., 510 U.S. 17, 21(1993).

In proving such a claim, Plaintiff must show that her workplace was "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Nichols v. Azteca Rest. Enters., Inc*., 256 F.3d 864, 871 (9th Cir. 2001)(quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998)). A hostile or abusive environment "can be determined only by looking at all of the circumstances." *Harris*, 510 U.S. at 23. That includes "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id*. "Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

The Federal Defendant contends that Plaintiff's sexual harassment and hostile workplace claim is time barred because Plaintiff did not present her claim to an EEOC counselor within 45 days of the discriminatory action. "To establish federal subject matter jurisdiction, a plaintiff is required to exhaust his or her administrative remedies before seeking adjudication of a Title VII claim. Exhaustion of administrative remedies under Title VII requires that the complainant file a timely charge with the EEOC, thereby allowing the agency time to investigate the charge." *Lyons v. England,* 307 F.3d 1092, 1103 -1104 (9th Cir. 2002) (citations omitted).

Plaintiff concedes that she failed to file the EEOC charge during the 45-day period, nonetheless, Plaintiff argues that she is entitled to equitable tolling on the exhaustion of administrative requirements due to (1) her mental or emotional disability and (2) never properly being informed of the legal consequences of not reporting sexual harassment within the 45-day period. The Court finds both arguments unpersuasive. First, Plaintiff's deposition testimony demonstrates that Plaintiff chose not to file an EEOC complaint because she did not want to "humiliate myself more than I needed to," due to her concerns regarding the confidentiality of the EEOC process. Although Plaintiff claims her psychological condition at the time caused her to not file an EEOC complaint, *Lopez v. Citibank*, 808 F.2d 905, 906 (1st Cir. 1987) (equitable tolling may be appropriate where Title VII plaintiff failed to file EEOC charge due to mental or emotional disability), her psychological condition did not prevent her from filing a complaint with the Postal Service. Second, according to Plaintiff's deposition, she discussed the EEOC as an option with Mr. Harrell, the union president. In addition, a poster regarding sexual harassment was posted at the workplace. The poster states that "If pursuing an EEO complaint, you must contact an EEO counselor within 45 days of the act(s) giving rise to your claim in order to preserve your rights under federal law." The Court finds that the poster was sufficient to apprise Plaintiff, albeit constructively, of the 45-day statute of limitations and that failure to do so would not preserve, or in other words extinguish, her rights under federal law, which would include Title VII claims. The Court therefore finds that Plaintiff is not entitled to equitable tolling on her sexual harassment hostile workplace claim. Accordingly, Plaintiff's First Cause of Action will be dismissed.

C. Constructive Discharge

"A constructive discharge occurs when, looking at the totality of circumstances, 'a reasonable person in [the employee's] position would have felt that he was forced to quit because of intolerable and discriminatory working conditions.'" *Watson*, 823 F.2d 360, 361 (citation omitted). The Federal Defendant argues that Plaintiff was not subjected to a constructive

discharge and that no reasonable person in Plaintiff's position would have felt that Plaintiff was forced to quit because of intolerable and discriminatory working conditions. According to the Federal Defendant, Plaintiff incurred no tangible employment action, no hostile work environment, and no acts of retaliation. The Court disagrees. As explained above, the Court found that the termination of Plaintiff's counseling sessions, as well as the manner in which the service inspection investigation was conducted, were sufficient to allege an adverse employment action under a retaliation claim. Nonetheless, the Federal Defendant argues that all of the alleged discriminatory acts were no longer present by the time Plaintiff left the Postal Service. Although the alleged acts did occur some months prior to Plaintiff going on sick leave in July 2000 and her resignation on November 14, 2000, the Court finds that a genuine issue of material fact exists as to whether the cumulative effects of the alleged retaliatory acts were sufficient to create an ongoing intolerable and discriminatory working condition. Specifically, a jury could find that a reasonable person would feel forced to quit if the perpetrator of sexual harassment was seemingly allowed to escape with impunity, not withstanding his removal on other grounds. Accordingly, the Court will not dismiss the claim.

D. Sovereign Immunity for State Law Claims

The Federal Defendant asserts that Plaintiff's Fourth Cause of Action for Intentional Infliction of Emotional Distress and her Fifth Cause of Action for Negligent Supervision are barred under the Federal Tort Claims Act (FTCA) because Plaintiff failed to file a claim with the Postal Service. Plaintiff's reliance on *Jense v. Runyon*, 990 F.Supp 1320 (D. Utah, 1998) is misplaced. The court in *Jense* acknowledged that the FTCA "preserves the United States' immunity from suit for '[a]ny claim arising out of assault [or] battery,'" *Jense*, 990 F.Supp at 1330, but held plaintiff's claims for negligent supervision and intentional infliction of emotional distress were not barred because her torts were not based primarily on assault or battery. However, the *Jense* court did not hold that the administrative requirements of the FTCA did not need to be complied with for a negligent supervision or intentional infliction of emotional distress

claim. Accordingly, because Plaintiff did not exhaust the administrative requirements of the FTCA, the Court will dismiss Plaintiff's Fourth and Fifth Causes of Action.

CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that the Federal Defendant's Motion to Dismiss and for Summary Judgment (#64) is GRANTED in part and DENIED in part as follows:

- the Court grants summary judgment as to Plaintiff's First Cause of Action for Hostile Work Environment.
- the Court grants summary judgment on Plaintiff's Third Cause of Action for Retaliation to the extent the claim is based on the following retaliatory acts: (1) attempted termination, (2) stand-up session, (3) shunned by co-workers. To the extent the Retaliation claim is based on (1) termination of counseling sessions, (2) constructive discharge, and (3) service inspection investigation, the motion is denied.
- the Court grants summary judgement as to Plaintiff's Fourth Cause of Action for Intentional Infliction of Emotional Distress and her Fifth Cause of Action for Negligent Supervision.
- the motion for summary judgment is denied in all other respects.

Dated: August 28, 2006.

ROGER L. HUNT
United States District Judge